

GIBSON DUNN

Litigation Update

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Contractual Liability and Damages Under Saudi Law: Recent Developments and the Permissibility of Loss of Profit Claims

This update explores how the concept of loss of profit in contractual liability has evolved in light of the enactment the Saudi Civil Transactions Law.

Recent developments, including the enactment of the Civil Transactions Law,^[1] have clarified certain aspects of recoverable damages in contractual liability, particularly regarding the permissibility of loss of profit claims under Saudi law. This article explores how the concept of loss of profit in contractual liability has evolved in light of the enactment of the Civil Transactions Law.

A. Historical Stance on Loss of Profit Claims

Previously, Saudi courts generally excluded the recovery of loss of profits in breach of contract claims. This was based on the prevailing Islamic Shari'a principle that compensation must be certain, rather than speculative. Courts viewed claims for lost profits as speculative, and thus were routinely rejected.^[2] However, there have been some court decisions that granted loss of profit claims, although these were exceptional and not part of a consistent judicial trend.^[3]

While these outlier court decisions did not clearly articulate a consistent standard for when loss of profits can be compensated, they referred to Islamic Shari'a principles that suggest loss of profits may be compensated where the loss is 'certain.' Article 5 of Resolution No. 109/3/12 of the International Islamic Fiqh Academy asserts that "...the damages that may be compensated

include actual financial damages, true losses, and certain loss of profit.” The key element here is the element of “certainty.” Although the courts have not articulated a clear threshold for certainty in these decisions, they implied that the loss of profit must be capable of being verified to avoid speculation.

B. Interpretation of Loss of Profit Claims Under the Civil Transactions Law

In June 2023, the Civil Transactions Law was promulgated by Royal Decree No. 191/D, dated 29/11/1444H. The enactment of the Civil Transactions Law has clarified the legal treatment of loss of profit claims, expressly permitting them.

However, the Civil Transactions Law does not provide specific criteria or standards for assessing such claims. This gave rise to uncertainty regarding how Saudi courts will approach claims for lost profits in breach of contract claims under the Civil Transactions Law. Therefore, claims for lost profits will most likely be assessed according to the general rules of contractual liability under the Civil Transactions Law. These include:

- **Contractual liability must be established:** All elements of contractual liability, namely breach, damages, and causation, must be proven by the claimant.^[4] Saudi courts have upheld this rule in multiple judgments, ensuring that a breach of contract claim is only successful when all three elements are satisfactorily established.^[5]
- **Quantum must be proven:** Establishing the occurrence of loss is not enough. The claimant must also prove quantum. In straightforward cases, such as those involving documentary evidence like invoices, proving the quantum of damages can be a relatively simple process. However, in more complex cases, expert evidence is typically required to establish the quantum of damages. This has been the standard practice in Saudi courts.
- **Recoverable losses must be typically foreseeable:** If compensation is not specified in the contract, the court will determine it. If the obligation arises from the contract and there is no fraud or gross negligence, damages are limited to those damages that are foreseeable at the time of the contract.^[6]
- **The loss must be a natural consequence of the breach:** As a general rule, recoverable damages include moral and material damages naturally arising from the breach, including loss of profit. The Civil Transactions Law uses an objective standard to determine this. Damages are considered a natural consequence if the aggrieved party could not have avoided them by exercising reasonable care.^[7]
- **The award must not enrich the creditor:** The goal of awarding damages in breach of contract cases is to restore the non-defaulting party to the position they would have occupied if the contract had been properly performed. In other words, compensation is intended to “fully cover the loss” and restore the aggrieved party to their original position - or to the position they would have been in - had the loss not occurred.^[8]

It is noteworthy that Article 1 of the Civil Transactions Law mandates that, in the absence of specific legal provisions, the courts must apply Islamic Shari’a principles that are consistent with the general provisions of the Civil Transactions Law. This means that, despite the Civil

Transactions Law's explicit allowance for loss of profit claims, the courts may still turn to Shari'a principles requiring certainty in such claims.

C. Conclusion

The treatment of loss of profit claims in Saudi Arabia has evolved with the introduction of the Civil Transactions Law, representing a significant shift in the legal landscape. While Saudi law now permits the recovery of lost profits, the courts have yet to establish clear guidelines on how such claims will be assessed. In the absence of detailed court decisions, the general rules of contractual liability will be controlling, and the courts may rely on Islamic Shari'a principles and the requirement for certainty in determining whether loss of profit claims are compensable. As the legal framework continues to develop, a clearer standard for these claims is likely to emerge.

[1] The Civil Transactions Law, promulgated by Royal Decree No. 191/D, dated 29/11/1444H.

[2] This position was upheld in multiple cases. See, for example, the Commercial Court of Appeal in Riyadh's Decision No. 4655 of 1442H and the Court of Appeal in Mecca's Decision No. 430329136 of 1443H.

[3] Court of Appeal of Board of Grievances' Decision No. 2454 of 1437 and Jeddah Commercial Court of First Instance's Decision No. 2393 of 1437H are examples of cases in which courts allowed claims for lost profits, citing Islamic Shari'a authorities that permit such claims if the loss is "certain."

[4] Article 2(1) of the Evidence Law, promulgated by Royal Decree No. D/43, dated 25/5/1443: ((A claimant shall have the burden of proof and a defendant shall have the burden of defense.))

[5] For instance, the Commercial Court of Appeal in Riyadh's Decision No. 4530050546 of 1445H: ((...if the three elements are satisfied, the claimant would be entitled to fair compensation for all damages; if one of those elements is not satisfied, the entitlement to compensation would terminate completely.))

[6] Article 180 of the Civil Transactions Law: ((If the amount of compensation is not specified in a contract or a legal provision, it shall be determined by the court in accordance with the provisions of Articles 136, 137, 138, and 139 of this Law. However, if the obligation arises from the contract, the debtor who has not committed any act of fraud or gross negligence shall be liable only for compensating harm that could have been anticipated at the time of contracting.))

[7] Article 137 of the Civil Transactions Law: ((The harm for which a person is liable for compensation shall be determined according to the aggrieved party's loss, whether the loss is incurred or in the form of lost profits, if such loss is a natural result of the harmful act. Such loss shall be deemed a natural result of the harmful act if the aggrieved party is unable to avoid such harm by exercising the level of care a reasonable person would exercise under similar circumstances.))

[\[8\]](#) Article 136 of the Civil Transactions Law: ((Compensation shall fully cover the harm; it shall restore the aggrieved party to his original position or the position he would have been in had the harm not occurred.))

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more, please contact the Gibson Dunn lawyer with whom you usually work, any leader or member of the firm's Litigation practice group, or the following authors in Riyadh:

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